

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

The Wang Theatre, Inc. d/b/a Citi Performing Arts Center and Boston Musicians Association, a/w American Federation of Musicians Local Union No. 9-535, AFL-CIO. Case 01-CA-179293

November 10, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on June 30, 2016, by Boston Musicians Association a/w American Federation of Musicians, Local Union 9-535, AFL-CIO (the Union), the General Counsel issued the complaint on July 14, 2016, alleging that The Wang Theater d/b/a Citi Performing Arts Center (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain following the Union's certification in Case 01-RC-166997. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On August 4, 2016, the General Counsel filed a Motion for Summary Judgment. On August 8, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain with the Union but denies that it is contesting the validity of the Union's certification. Rather, the Respondent denies that it has any obligation to bargain on the basis of its arguments, raised and rejected in the underlying representation proceeding, that there are no employees in the unit, and that third-party producers control the unit's terms and conditions of employment. In addition, the Respondent argues that regardless of the appropriateness of the certification, the Union has not sought bargaining over any terms and conditions of employment within the Respondent's control and that the Union's only bargaining request, made at the representation hearing, was for an "unlawful arrangement" directed at the labor relations of third party producers.

We find that these assertions raise no issue warranting a hearing.¹ Regarding the Respondent's argument that the Union has not sought bargaining over terms and conditions of employment within the Respondent's control, the Respondent's answer to the complaint admits that the Union requested bargaining and the Respondent refused (see Respondent's answer to the complaint, pars. 8, 9). Furthermore, the Respondent's contention that it lacked control over the unit's terms and conditions of employment was raised and rejected in the underlying representation proceeding.

Indeed, all representation issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).²

¹ The Respondent asserts now, as it did in the representation proceeding, that it does not currently employ any employees in the unit. The Respondent further submits that events subsequent to the representation hearing have confirmed its contention that the unit's lack of employees is not a temporary condition, as it has been more than 20 months since there was employment in the unit and that by the end of the 2016 season the unit will have lacked employment for more than 2 years. Even assuming that the Respondent's contention regarding postelection events has been properly raised in this proceeding, we find that the contention is without merit. The Regional Director directed the election in the representation proceeding applying the eligibility standard set forth in *Juilliard School*, 208 NLRB 153, 155 (1974) (employees eligible to vote if they worked on two productions totaling 5 days during the past year, or worked at least 15 days during the past 2 years). The Respondent does not argue that under that standard the unit lacked employees at the time of the election, at the time it refused the Union's bargaining request, or even currently. Further, the Respondent's mere speculation regarding the unit's future composition is insufficient to establish that there are genuine issues of material fact warranting a hearing. In essence, the Respondent is asserting that the Union's certification, based on a Board-conducted election in which the Union received a majority of the votes, should not be honored during the certification year. Therefore, we find that the Respondent has not raised any "unusual circumstances" relieving it of its obligation to bargain. Cf. *King Electric, Inc.*, 343 NLRB No. 54, slip op. at 1, fn. 1 (2004) (not reported in Board volumes), enf. denied on other grounds 440 F.3d 471, 474 (D.C. Cir. 2006) (rejecting respondent's contention that a change in the size of the bargaining unit shortly after the election constitutes "unusual circumstances" relieving it of its bargaining obligation).

² Member Miscimarra agrees that summary judgment is appropriate in this unfair labor practice case because the Respondent has not presented any new matters that were not previously resolved in the prior representation case. Member Miscimarra did not participate in the prior representation case, and does not reach or pass on the merits of the Board's decision in that case.

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a non-profit corporation with an office and place of business located at 270 Tremont Street, Boston, Massachusetts (the Boston location), where it has been engaged in the operation of a performing arts theatre.

Annually, the Respondent, in conducting its operations described above, derives gross revenues in excess of \$1 million and purchases and receives at its Boston location goods valued in excess of \$5000 directly from points located outside the Commonwealth of Massachusetts.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held by mail ballot, in which the ballots were mailed to voters on February 11, 2016, and counted on March 22, 2016, the Union was certified on March 30, 2016, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All musicians employed by The Wang Theatre, Inc. at its performance hall at 270 Tremont Street, Boston, Massachusetts, but excluding all other employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By email on June 10, 2016, the Union requested that the Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the unit.

Since about June 29, 2016, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since June 29, 2016, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, The Wang Theatre d/b/a Citi Performing Arts Center, Boston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Boston Musicians Association A/W American Federation of Musicians, Local Union 9-535, AFL-CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All musicians employed by The Wang Theatre, Inc. at its performance hall at 270 Tremont Street, Boston, Massachusetts, but excluding all other employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Boston, Massachusetts, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 29, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 10, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Boston Musicians Association A/W American Federation of Musicians, Local Union 9-535, AFL-CIO as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All musicians employed by The Wang Theatre, Inc. at its performance hall at 270 Tremont Street, Boston, Massachusetts, but excluding all other employees, guards and supervisors as defined in the Act.

THE WANG THEATER D/B/A CITI PERFORMING
ARTS CENTER

The Board's decision can be found at www.nlrb.gov/case/01-CA-179293 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."